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No. 99-474

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

ANDREW S. NATSIOS, Secretary of Administration and Finance of the Commonwealth of Massachusetts, and PHILMORE ANDERSON, III, State Purchasing Agent,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

CORRECTED COPY

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENT NATIONAL FOREIGN TRADE COUNCIL

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62 pp

QUESTIONS PRESENTED

1. Whether the First Circuit correctly held that the Massachusetts Burma Law, Mass. Gen. Laws ch. 7, §§ 22G-22M—which was undisputedly enacted to condemn the Nation of Myanmar and to influence the conduct of its government—unconstitutionally infringes upon the federal government's exclusive authority to regulate foreign affairs.

2. Whether the Massachusetts Burma Law, which discriminates against foreign commerce, violates the "speak-with-one-voice" principle, and seeks to regulate extraterritorial activity in a foreign nation, violates the Foreign Commerce Clause.

3. Whether the Massachusetts Burma Law, which upsets the delicate balance established by federal Myanmar sanctions, is preempted by federal law.

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STATEMENT

The Act of June 25, 1996, Chapter 130, § 1, 1996 Mass. Acts 210, codified at Mass. Gen. Laws, ch. 7 §§ 22G-22M ("the Massachusetts Burma Law"), operates as a secondary boycott of Myanmar (formerly Burma), effectively preventing most companies "doing business" in Myanmar from securing contracts to provide goods and services to Massachusetts agencies. The Law defines "doing business" expansively as: (1) having any place of business, lease, franchise or distribution agreement in Burma; (2) being the majority-owned subsidiary, licensee or franchisee of a company that has such contacts with Burma; (3) providing any goods or services, including financial or consulting advice, to the government of Burma; or (4) "promoting the importation or sale of gems, timber, oil, gas, or other related products, commerce in which is largely controlled by the government of Burma." *See* Mass. Gen. Laws ch. 7, § 22G (hereinafter "MBL").

Under the Law, Massachusetts prepares and circulates a restricted purchase list, based upon "United Nations reports, resources of the Investor Responsibility Research Center and the Associates to Develop Democratic Burma, and other reliable sources," identifying companies known to do business in Myanmar. § 22J. When Massachusetts decides to add a company to (or delete it from) the list, it requires the company to provide detailed documentation concerning its activities in Myanmar and affirmatively demonstrate to a state official why it should not be listed. J.A. 216-17. State agencies must increase the bid price for goods and services by 10 percent if the bidder is on the restricted purchase list. § 22H(d). Thus, with limited exceptions (§§ 22H(e), 22I), the Law "effectively force[s] businesses to choose between doing business in Burma or

with Massachusetts" (Pet. App. 9a), since the "ten-percent bidding penalty [works] . . . an effective exclusion from the bidding process." Pet. App. 57a.

Massachusetts' purchasing power is substantial, involving more than $2 billion each year. J.A. 225. Massachusetts' avowed purpose in enacting the Law was to use this power to condemn Myanmar and to affect the domestic policies of that nation. The Law's legislative history, wholly ignored by Massachusetts' brief, is revealing. Its sponsor called the Law a "foreign policy" initiative whose "identifiable goal" was "free democratic elections in Burma." Pet. App. 9a; J.A. 39-40. Other Massachusetts legislators described the Law as Massachusetts "engag[ing] in their own little version of foreign policy" (J.A. 35), "set[ting] up some foreign policy business guidelines" (J.A. 46), "dabbl[ing] in foreign affairs" (J.A. 50), and "promot[ing] and stand[ing] for civil and human rights" in Burma. J.A. 53. The Law's proponents lauded it as a vehicle for pressing the federal government to alter its foreign policy toward Myanmar. J.A. 47, 102. The Governor's signing statement said the Law "ma[de] a stand for the cause of freedom and democracy around the world"; he expressed hope that "Congress will follow our example." J.A. 57. Neither the sponsor of the bill, nor the legislators who debated it, nor the Governor who signed it into law mentioned any economic benefit to Massachusetts, its agencies, or its citizens. *See* Pet. App. 10a. The purpose, as Massachusetts conceded below (Pet. App. 9a), was "'to apply indirect economic pressure against the Burma regime for reform.'"

The economic impact of the Law has been significant. When then-Governor Weld signed the Law, he called it "more than symbolic action" that would "affect millions of dollars in state business."[1] The Law covers all of the

[1] Vaillancourt, *Massachusetts Becomes First State to Boycott Burma Business*, Boston Globe, June 26, 1996, at 27.

$2 billion in yearly purchases by Massachusetts and its agencies. Because foreign trade with Myanmar generates nearly $2.3 billion annually in revenues, it is not surprising that companies historically have done business with both Massachusetts and Myanmar. Pet. App. 9a.

The Law's impact is perhaps best measured by the breadth of the restricted purchase list. When this case was filed, the list (J.A. 170-95) contained 346 companies, including 44 U.S. companies (of which 15 were Fortune 500 companies), and many foreign companies with U.S. subsidiaries and affiliates. J.A. 219. The total annual revenue of the publicly traded U.S. companies on the list exceeded $246 billion. *Id.* According to the Law's sponsor, at least 13 companies have exited Myanmar because of the Law's passage. J.A. 100-01. Some NFTC members have chosen to cease doing business in Myanmar to avoid sanctions; others have been penalized by Massachusetts for continuing to do business in Myanmar. Pet. App. 10a, 93a.

The Burma Law departs materially from the approach of a federal statute. In 1996, shortly after Massachusetts enacted the Law, Congress carefully crafted a foreign-relations statute to exress its own disapproval of the political conditions in Myanmar. This statute (i) prohibited all but humanitarian assistance to Myanmar; (ii) directed the Executive Branch to vote against assistance to Myanmar in international financial institutions; and (iii) barred Myanmar officials from entering the United States. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009-167 (1996) (hereinafter "OCCA"). The federal statute did not include trade sanctions, but Congress granted the President the power to impose trade sanctions if warranted; even so, the President could restrict only "new investment" in Myanmar, and not contracts for goods, services, or technology. *Id.* §§ 570(b), (c), (f). Congress also directed

the President to develop a multilateral strategy for pressuring Myanmar to change. The President was authorized to waive sanctions if "he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States." *Id.* § 570(e).

In May 1997, President Clinton imposed trade sanctions on Myanmar. *See* President's Message to Congress Transmitting Executive Order No. 13,047 (May 20, 1997); Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (1997). Unlike the Massachusetts Law, the federal sanctions did not penalize companies for doing business in or with Myanmar unless new investment was involved, and they did not apply at all to purchases of goods and services or to foreign companies. The structure and history of the federal law and executive order show that their purpose was to pursue a carefully crafted balance between too-harsh sanctions, which would eliminate the possibility of further influencing the Myanmar regime, and too-lenient sanctions that would be ineffective.[2] Neither the federal law nor the executive order suggested that separate state or municipal action was desirable or appropriate.

In 1996, the procurement expenditures of states and municipalities totaled as much as $730 billion. United

[2] *See* S. 1092, 104th Cong., 1st Sess. (1995) (Congress rejected an amendment that would have prohibited all United States investment in Myanmar); 142 Cong. Rec. S8746 (daily ed. July 25, 1996) (Senator Cohen opposed mandatory sanctions because such sanctions would "relinquish all of [the United States'] . . . remaining leverage in Burma . . . [and] further bind the hands of this and any future administrations, taking away those tools of diplomacy—incentives . . . which are crucial"). *See also* Larson, *State and Local Sanctions: Remarks to the Council of State Governments* (Dec. 8, 1998) at 3-4 ("These measures reflect a considered federal government decision not to impose much more rigorous economic sanctions and thereby to maintain some level of economic engagement with Burma in order to further our foreign policy objectives there.") (available at http://ofii.com/resources/legis/remarks.html).

States Dep't of Commerce, *Statistical Abstract of the United States 1999*, at 312 tbl. 512. Numerous state and local governments have used this purchasing power to intrude into foreign policy in a variety of contexts. Following enactment of the Massachusetts Law, at least 16 other jurisdictions enacted similar sanctions.[3] At least six others considered, but then declined to enact, such legislation in part out of concern that it would be an inappropriate and unconstitutional effort to make foreign policy.[4] The ordinances that were adopted are quite similar: "Each contains a preamble referencing and condemning the political practices of the Burmese regime, and several refer to the struggles and valor of Aung San Suu Kyi and other notables who have expressed their opposition to the SLORC regime"; most "includ[e] . . . language purporting to establish a legitimate local purpose in taking a stand against injustice across the world"; and "several . . . include language contemplating their possible constitutional infirmity."[5] Furthermore, private spe-

[3] *See, e.g.*, Alameda Cty., Cal., Admin. Code, Title 4, ch. 4.32 (1999); Alameda Cty., Cal., Admin. Code, Title 4, ch. 4.36 (1999); Amherst, Mass., Annual Town Mtg. Art. 43 (May 14, 1997); Berkeley, Cal., Res. No. 59-853-N.S. (Jan. 12, 1999); Brookline, Mass., Res. Spec. Town Mtg. (Nov. 4, 1997); Cambridge, Mass., City Council Res. (July 27, 1998); Chapel Hill, N.C., Res. 97-1-13/R-16 (Jan. 13, 1997); Los Angeles, Cal., Admin. Code, Ord. No. 138,300 div. 10, art. 12 (1999); New York, N.Y., Local Law No. 33 (May 30, 1997); Newton, Mass., Ord. V-146 (Nov. 3, 1997); Palo Alto, Cal., Res. 7715 (Oct. 20, 1997); Portland, Or., Res. 35710 (July 8, 1998); Quincy, Mass., Municipal Code, Title 2, Ch. 2.48 (1997); Santa Cruz, Cal., Res. NS-23,401 (July 8, 1997); Somerville, Mass., Ord. No. 1998-1, § 2-386 (Feb. 1998); Takoma Park, Md., Ord. 1996-33 (Oct. 1996); West Hollywood, Cal., Municipal Code, Sec. 2701 (1998).

[4] *See, e.g.*, Cal. A.B. 888, 1997-98 Regular Sess. (Cal. 1998); Conn. H.R. 6354, Jan. Sess. 1997 (Conn. 1997); S. 354, 1998 Regular Sess. (Md. 1998); N.C. S. 1054, 1997 Sess. (N.C. 1997); N.Y. A.B. 9147, 1998 Sess. (N.Y. 1998); S. 984, Jan. Sess. 1997 (R.I. 1997).

[5] Schmahmann & Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties With Burma (Myanmar)*, 30 Vand. J. Transnat'l L. 175, 180-83 (1997).

cial-interest groups play a large part in administering these ordinances.[6] State and municipal forays into the field of foreign affairs have been aimed not just at Myanmar, but have extended as well to countries such as Switzerland, China, Saudi Arabia, Northern Ireland, Nigeria, Indonesia, Egypt, Pakistan, Turkey, Sudan, North Korea, Iraq, Morocco, Laos, and Vietnam. *See* Br. *Amici Curiae* of Chamber of Commerce *et al.* at 9-10.

The Massachusetts Law has adversely affected U.S. international relations. Several foreign nations have objected to the Burma Law. Pet. App. 10a. The Association of South East Asian Nations ("ASEAN"), the European Union ("EU"), and Japan have expressed serious concerns to the federal government regarding the Massachusetts Law and publicly stated that the Law has a serious detrimental effect on relations with the United States. Pet. App. 24a-25a. The Law has strained U.S. international, political, and economic relations, focusing, in the words of the EU, "governments on an area of conflict and away from opportunities to achieve shared foreign-policy objectives." Br. *Amici Curiae* of European Communities and Their Member States at 6. In 1997, the EU and Japan each lodged complaints with the World Trade Organization ("WTO"), condemning the Law as a violation of the United States' international obligations. J.A. 88-90, 91-92. State Department officials have characterized state and local sanctions like the Burma Law as "do-[ing] more harm than good" (J.A. 135), and have specifically described the resulting WTO complaints as "an irritant [that] has diverted the United States' and Europe's attention from focussing where it should be—on Burma." J.A. 166.

On April 30, 1998, the NFTC sued the officials charged with administering and enforcing the Burma Law, seek-

[6] *Id.*

ing a declaratory judgment that the Law was unconstitutional, as well as a permanent injunction barring its enforcement. The parties entered into a lengthy stipulation of facts. On cross-motions for summary judgment, both sides agreed that there was no factual dispute, including no dispute concerning the deplorable human-rights situation in Myanmar. After briefing and argument, the district court permanently enjoined enforcement of the Law, holding that the Massachusetts Law "unconstitutionally impinge[d] on the federal government's exclusive authority to regulate foreign affairs." Pet. App. 81a.

On appeal, the First Circuit affirmed, holding that the Burma Law was invalid on three grounds. *First*, the Law "clearly" interfered with the federal government's exclusive power to conduct foreign affairs by "present[ing] a threat of embarrassment to the country's conduct of foreign relations regarding Burma." Pet. App. 22a, 27a. *Second*, the Law "facially discriminate[d] against foreign commerce," regulated extraterritorially, impaired the United States' "one voice" on foreign matters, and did not fall within any possible (though "unlikely") "market-participant" exception to the Foreign Commerce Clause. Pet. App. 48a, 52a. *Third*, the Law "veer[ed] from the carefully balanced path that Congress . . . constructed," and therefore was preempted. Pet. App. 70a, 73a. In this Court, the NFTC's position is supported by *amici curiae* including the EU and its Member States, organizations representing American business, numerous former U.S. government officials, Members of Congress, and others.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 200 years, our national government has employed sanctions against merchants as an instrument of foreign policy. Such sanctions express disapproval of other nations and their policies, and use economic leverage as a means of bringing about change in their conduct.

An enduring tenet of the Framers, and of this Court's decisions, has been that the Constitution reserves such foreign-policy exercises exclusively to the national government. To allow individual state action would undermine national policy and put the Nation at risk. Indeed, specifically barring state sanctions of this type was a particular motivating purpose of the Framers. In the period of 1783-1786, national sanctions against British merchants aimed at reopening the West Indies to American shipping were undermined by states' decisions to impose their own differing sanctions, or no sanctions at all. The lesson thus learned by hard experience suggested the obvious solution—exclusive federal power. The Federalist urged ratification of the Constitution in significant part because federal exclusivity was essential.

There is no single clause in the Constitution allocating foreign-affairs responsibility to the national government, but the Framers well understood that some principles were so inherent in the very structure of the new government that they needed no explicit text: The Constitution accomplished an "alienation of state sovereignty . . . where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." *The Federalist No. 32* at 198 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis in original). The Framers considered state exercises of foreign-affairs power to be "absolutely and totally contradictory and repugnant" to the Constitution's plan of government. This Court has never expressed any doubt on this score, and so held explicitly in *Zschernig v. Miller*, 389 U.S. 429 (1968).

The Massachusetts Burma Law invades that exclusive federal sphere. Massachusetts, by restricting state contracts, has unquestionably sanctioned companies that do business with, and in, Myanmar as a means of condemning that nation and coercing change in its government.

The Law has had its intended effect on companies doing business in Myanmar. Many have ceased doing business with and in Myanmar, or have been penalized for continuing to do so, as a result of the Burma Law. Still others have been coerced by the Law into not entering business relationships in Myanmar. Not unexpectedly, protests by other nations followed enactment of the Burma Law.

The Burma Law also violates the Foreign Commerce Clause. The Law discriminates against companies engaged in commerce with and in Myanmar; it regulates extraterritorially by seeking to control conduct occurring in a foreign country; and it significantly impairs the national government's power to speak with one voice on foreign-commerce matters. No market-participant exception can save the Law, either: The Law admittedly creates no economic benefit to Massachusetts or its citizens; rather, it seeks to use Massachusetts' considerable purchasing power to discourage virtually all commercial transactions involving Myanmar regardless of whether Massachusetts is connected to such transactions in any way. And, on this undisputed record, it is clear that the Law is regulatory, not proprietary—it does not represent the kind of action that any private contracting party would take.

There is likewise no question that the Burma Law conflicts with the federal law imposing sanctions on Myanmar. In 1996, Congress crafted a balanced statute imposing limited sanctions on Myanmar aimed at altering political conditions in that nation. In contrast to the Massachusetts Law, the federal sanctions prohibit only certain new investments, allow trade with Myanmar, and can be modified or terminated by the President in response to human-rights improvements. The Law disrupts the carefully crafted federal balance and impermissibly conflicts with federal policy.

If the Massachusetts Burma Law were allowed to stand, so would dozens of other state and local selective-purchasing laws sanctioning trade with a wide variety of other countries. To date, other jurisdictions have been constrained from enacting similar laws by well-founded concerns as to their constitutionality. A decision by this Court upholding the Burma Law would give 50 state governments and 39,000 other local governments, with their massive purchasing power, free rein to initiate their own versions of foreign policy against any foreign nation. Allowing a thousand, or ten thousand, different foreign policies to bloom would be a detriment to the Nation and contravene the constitutional plan.

ARGUMENT

I. THE BURMA LAW UNCONSTITUTIONALLY INFRINGES UPON THE FEDERAL GOVERNMENT'S EXCLUSIVE FOREIGN-AFFAIRS POWER

Under our Constitution, the conduct of foreign affairs is the responsibility of the federal government, and only the federal government. The historical record of the Constitution, the Federalist Papers, close to 200 years of this Court's precedents, and common sense all confirm this principle. Massachusetts, however, seeks a virtually unfettered right to use its purchasing authority to sanction private companies, with the object of compelling reform in Myanmar. The holding that Massachusetts seeks would effectively remit our Nation's foreign policy to the same confused state of affairs that existed under the Articles of Confederation. Like the courts below in this case, virtually all prior cases in the lower courts have invalidated state laws intruding into the field of foreign affairs.[7] This Court should do the same.

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[7] *See, e.g., Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1376 (D.N.M. 1980); *Springfield Rare Coin Galleries v. Johnson*, 503 N.E.2d 300, 305, 307 (Ill. 1986); *New York Times Co. v. New York Comm'n on Human Rights*, 393 N.Y.S.2d 312, 317 (1977); *but see Board of Trustees v. Mayor and City Council of Baltimore City*, 562 A.2d 720 (Md. 1989) (upholding Baltimore ordinances requiring city pension funds to divest their holdings in companies doing significant business in South Africa).

A. Prior To The Framing, The Conduct Of Foreign Relations By Individual States Threatened The National Government's Ability To Conduct Effective Foreign Policy

Under the Articles of Confederation, Congress lacked the authority to prevent individual states from conducting their own foreign policy.[8] As a result, individual states and their dissonant voices on foreign affairs repeatedly caused foreign-policy embarrassments to the Nation.

Two prominent foreign-policy episodes under the Articles are particularly pertinent: A number of states (including Massachusetts) enacted legislation barring British merchants from collecting prewar debts that had been guaranteed by the 1783 Treaty of Paris. To protect its merchants, Britain responded by barring the entry of almost all American goods into the British West Indies and refusing to abandon military outposts blocking the Great Lakes fur-trade routes. The effects were devastating to the fledgling American economy. F. Marks, *Independence on Trial: Foreign Affairs and the Making of the Constitution*, at 11, 60-66 (1973). Congress dispatched John Adams to reopen British trade and try to head off war. Adams quickly realized that he could gain diplomatic leverage with Britain only if the states were to abide by the terms of the treaty. His pleas to the states to repeal laws that violated the treaty were echoed by others (Jay and Hamilton included) and by Congress. *Id.* at 12-14, 67. In the end, though, "[t]he states would

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[8] *See* Jay, *An Address to the People of the State of New-York On the Subject of the Constitution, Agreed Upon at Philadelphia, The 17th of September 1787*, in *Pamphlets on the Constitution of the United States* 72 (P.L. Ford ed. 1971).

not cooperate despite unremitting labor on the part of Congress and various individuals." *Id.* at 14.[9]

The national government's inability to direct foreign policy and regulate foreign commerce only steeled Britain's intransigence; in fact, many British officials "felt that the United States had no government at all." *Id.* at 56. Lord Sheffield summed up British sentiment: "[N]o treaty can be made with the American states that can be binding on all of them. . . . When treaties are necessary, they must be made with the states separately." *Id.* at 55.

Then a second, related problem surfaced. Unable to secure state compliance with the peace treaty, the Nation took a different tack—it attempted to retaliate against British merchants to force Britain to open the British West Indies to American merchants and to enter into a trade treaty. At Adams' urging, Congress passed a resolution asking the states to cede it a fifteen-year power to prohibit the import and export of goods in British ships and by British residents. The states, despite three years of debate, never complied. 1 J. Story, *Commentaries on the Constitution of the United States* § 262, at 187 (M. Bigelow ed., 5th ed. 1994).

Instead of abiding by national policy, individual states retaliated against Britain in their own widely varying ways, ranging from duties of tonnage to discriminatory taxes on British imports. Marks, *supra*, at 80-81. Most significantly, "[t]here was always some state which refused to discriminate against the British and chose to profit at the expense of its neighbors." *Id.* at 82.[10] For

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9 *See also Oldfield v. Marriott*, 51 U.S. (10 How.) 146, 163-64 (1850) (describing Adams' unsuccessful efforts to establish trade with Britain).

10 *See also* Rakove, *Making Foreign Policy—The View From 1787*, in *Foreign Policy and the Constitution* 1, 2 (R. Goldwin & R. Licht eds. 1990); 1 Story, *Commentaries*, *supra*, § 263, at 187-88.

one, Connecticut left its ports open to capture British commerce that otherwise would have flowed to neighboring states; for another, New Jersey refused to retaliate in the hopes of building up commerce in the port cities of Perth Amboy and Burlington. *See id.* at 82. "[U]nable to endure the consequences of a disadvantaged position," other states soon dropped or refused to enact their own retaliatory measures. *Id.* The states' divergent approaches made a national policy impossible.

The episodes with Britain were hardly the only foreign-affairs disruptions caused by individual states. "Abortive negotiations [for trade treaties] with other powers, notably Austria and Denmark, failed because [of] the growing ineptitude and powerlessness of the Confederation to enforce its treaties against the thirteen component states . . . ." S. Bemis, *A Diplomatic History of the United States* 66 (1936). And when Spain closed the Mississippi River to American shipping in 1784 as part of a border dispute, parochial state interests paralyzed the Nation's foreign policy. While Spain offered some concessions to resolve the dispute, it steadfastly refused to reopen the Mississippi under any circumstances. Southern states viewed reopening of the Mississippi as essential to their economic survival and were willing to provoke war to regain navigational rights. Northern states, having less of an interest in the navigability of the Mississippi River, were all too willing to disclaim navigation rights as a means of stemming westward expansion, depletion of their already scarce labor pool, and a shift of political influence westward. Marks, *supra*, at 24-25, 28. Even though the Nation was desperate to open new markets, and the possibility of war with Spain loomed, the intractable differences in state policies deprived the nation of a coherent foreign policy. *Id.* at 30.

As a consequence of the states following their own individual foreign policies, during the "critical period of

1783-89 American diplomacy was at its lowest ebb and power." Bemis, *supra*, at 83. As Story described the muddled state of our foreign affairs, "[w]e were . . . the victims of our own imbecility, and reduced to a complete subjection to the commercial regulations of other countries, notwithstanding our boasts of freedom and independence." 1 Story, *Commentaries, supra*, § 261, at 186.

B. The Constitution Was Designed To Place Exclusive Control Of Foreign Affairs In The Hands Of The Federal Government

The turmoil caused by the states' individual foreign policies served as a "major drive wheel in the movement for constitutional reform." Marks, *supra*, at 50. "Nothing contributed more directly to the calling of the 1787 Constitutional Convention than did the spreading belief that under the Articles of Confederation Congress could not effectively and safely conduct foreign policy." [11]

The need to consolidate foreign-affairs power in the national government took center stage almost from the start of the Constitutional Convention in 1787. Governor Edmund Randolph introduced his Virginia Plan (upon which the Constitution ultimately was based), by attacking, among other things, Congress' inability under the Articles to prevent individual states from "provok[ing] war" and disrupting efforts to "counterac[t] . . . the commercial regulations of other nations." I *The Records of the Federal Convention of 1787*, at 18-19 (M. Farrand ed. 1966). He also urged that his plan contained "many advantages, which the U.S. might acquire, which were not attainable under the confederation—such as . . . counteraction of the commercial regulations of other nations." *Id.* at 19. The delegates specifically rejected William

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[11] LeFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. Am. Hist. 695, 697 (1987); *accord Oldfield*, 51 U.S. at 164; Marks, *supra*, at 3.

Paterson's competing New Jersey Plan (which continued the basic structure of the Articles of Confederation with a few added congressional powers) because, among other defects, it did not adequately ensure that "no part of a nation shall have it in its power to bring . . . on the whole" the "national calamit[y]" of a "rupture with other powers." J. Madison, *Notes of Debates in the Federal Convention of 1787* at 142 (1966).

Indeed, the Convention delegates were of "virtual unanimity" that foreign-affairs power should be vested exclusively in the national government. Marks, *supra*, at 143.[12] The only disagreement concerned the proper allocation of that power among the branches of the federal government.[13] Ultimately, the delegates divided the foreign-relations authority between the political branches of the federal government, but not with the states.

This division is reflected in the Constitution's text: Article I, Section 8 confers upon Congress a wide array of foreign-affairs-related powers, including the powers to "pay the Debts and provide for the common Defence . . . of the United States" (cl. 1), "regulate Commerce with foreign Nations" (cl. 3), "establish an uniform Rule of Naturalization" (cl. 4), "regulate the Value . . . of foreign Coin" (cl. 5), "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations" (cl. 10), and "declare War, grant Letters of Marque and Reprisal, and make Rules concerning captures on Land and Water" (cl. 11). Article II likewise confers a broad array of foreign-affairs au-

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[12] *See also* Denning & McCall, *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?*, 26 Hast. Const. L.Q. 307, 317 n.51 (1999) (citing sources).

[13] *See* L. Levy, *Original Intent and the Framers' Constitution* 30-53 (1988).

thority upon the Executive. The President "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States" (§ 2, cl. 1). "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties" and "shall appoint Ambassadors, other public Ministers and Consuls" (§ 2, cl. 2). The President also "shall receive Ambassadors and other public Ministers" (§ 3).

Conversely, the Constitution emphasizes the lack of foreign-affairs powers in the states. Article I, section 10 states that "[n]o State shall enter into any Treaty, Alliance, or Confederation" or "grant Letters of Marque and Reprisal" (cl. 1). "[W]ithout the Consent of the Congress" states likewise may not "keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact . . . with a foreign Power, or engage in War" (cl. 3).

The Constitution does not contain a single "foreign-affairs" clause that explicitly confers all foreign-affairs power on the federal government and excludes the states from all foreign-affairs matters. But the Framers did not expressly spell out each and every instance in which the states' powers were curtailed by the Constitution—even obvious limits on state power such as the power to appoint ambassadors or public ministers. The Federalist Papers, regarded by this Court as "indicative of the original understanding of the Constitution" (*Printz v. United States*, 521 U.S. 898, 910 (1997)), demonstrates this: "[A]lienation of state sovereignty" occurred "where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and *where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.*" *The Federalist No. 32* at 198 (A. Hamilton) (emphasis added in part).

Plainly, the Framers regarded foreign-affairs power as necessary to the proper functioning of a sovereign and independent nation, and concurrent state authority as "totally contradictory and repugnant" to the constitutional plan. The Federalist Papers deconstrates "[t]he importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field." *Hines v. Davidowitz*, 312 U.S. 52, 62 n.9 (1941). They are replete with variations on a central theme: "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." *The Federalist No. 42* at 264 (J. Madison). The Constitution's placement of all foreign-affairs power in the hands of the federal government, the authors urged, would solve the most serious problems experienced under the Articles of Confederation: "This alteration [in the structure of the government] is fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible." *The Federalist No. 44* at 281 (J. Madison).

The otherwise contentious ratification debates are remarkable for their total lack of disagreement that the federal government should wield exclusive foreign-affairs power. The Anti-Federalists "rarely discussed foreign affairs" (Marks, *supra*, at 196), because they *agreed* with the Federalists on the need for an exclusive federal foreign-affairs power. *See* H. Storing, *What the Anti-Federalists Were For: The Political Thought of Opponents of the Constitution* 27 (1981). The "Federal Farmer," believed to be Richard Henry Lee, wrote that powers "respecting external objects, as all foreign concerns . . ., can be lodged no where else, with any propriety, but in this government."[14] "Agrippa," believed to be James

[14] Letter from the Federal Farmer to the Republican III (Oct. 10, 1787), in 2 *The Complete Anti-Federalist* § 2.8.35, at 239 (H. Storing ed. 1981).

Winthrop, preferred amending the Articles to creating a new Constitution, but he agreed that "the intercourse between us and foreign nations, properly forms the department of Congress."[15] Jefferson, himself hardly a proponent of an expansive federal government, urged even before the Constitutional Convention that a new government should "make us one nation as to foreign concerns, and keep us distinct in Domestic ones . . . ."[16]

Indeed, the First Congress, whose actions are "'contemporaneous and weighty evidence' of the Constitution's meaning" (*Bowsher v. Synar*, 478 U.S. 714, 723 (1986)), clearly viewed foreign affairs as the business of the Nation, not of the states. In addition to enacting statutes that implemented the specific grants of foreign-affairs authority in the Constitution,[17] the First Congress acted more broadly by establishing a Department of Foreign Affairs (Act of July 27, 1789, 1 Stat. 28) and appropriating funds for the conduct of "intercourse between the United States and foreign nations." Act of July 1, 1790, 1 Stat. 128. Massachusetts itself recognized the new national order: In 1790, the Commonwealth became concerned that British subjects were making encroachments on its eastern boundary in violation of the Treaty of Paris; but rather than retaliate, the legislature passed a resolve directing the governor to communicate the Commonwealth's

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[15] Letters of Agrippa (Jan. 14, 1788), in 4 *The Complete Anti-Federalist* § 4.6.54, at 98.

[16] Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), in 10 *Papers of Thomas Jefferson* 603 (J. Boyd ed. 1954).

[17] *See, e.g.*, Act of July 4, 1789, 1 Stat. 24 (laying duties on imports); Act of July 20, 1789, 1 Stat. 27 (imposing duties of tonnage); Act of March 26, 1790, 1 Stat. 103 (establishing a uniform rule of naturalization); Act of Apr. 30, 1790, 1 Stat. 112 (punishing certain crimes, including treason and piracy); Act of March 3, 1791, 1 Stat. 214 (appropriating funds to conclude a treaty with Morocco).

concern to the President for further action. Resolve of Feb. 1, 1790, ch. 42, 1789-1790 Mass. Resolves 635.

C. A Long And Unbroken Line Of This Court's Decisions Has Held That The Foreign-Affairs Power Is Vested Exclusively In The Federal Government

This Court has repeatedly shown the same "concern for uniformity in this country's dealings with foreign nations" (*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)), shared by both the proponents and opponents of the Constitution. In 1840, Chief Justice Taney wrote:

> Every part of [the Constitution] shows that our *whole foreign-intercourse* was intended to be committed to the hands of the general government . . . . It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation; *and to cut off all communications between foreign governments, and the several state authorities.*

Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575-76 (1840) (opinion of Taney, C.J.) (emphasis added). The Court's decisions since have reflected the same view, variously describing the national government's authority over foreign relations as "full and exclusive," "entirely free from local interference" (*Hines*, 312 U.S. at 63), and "not shared by the States [but] vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). The rule that comes out of these decisions is straightforward: As to foreign relations, the national government's jurisdiction is not merely concurrent with the states', it is exclusive.[18]

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[18] *See also, e.g., Sabbatino*, 376 U.S. at 427 n.25 ("Various constitutional . . . provisions . . . reflec[t] a concern for uniformity in this country's dealings with foreign nations and indicat[e] a desire to give matters of international significance to the jurisdiction of the federal institutions."); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[I]n respect of foreign relations generally, state lines

In the course of those decisions, this Court has unequivocally rejected the argument made by the Commonwealth (Pet. Br. 41-42) that the Constitution's specific enumerations of particular foreign-affairs powers define the limits of federal exclusivity: "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true *only in respect of our internal affairs*." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936) (emphasis added). The "entire control of international relations" is vested in the federal government not just because of the Constitution's specific textual provisions, but due to the United States' status as a "sovereign and independent nation." *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).[19] This Court has noted that the

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disappear."); *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."); *United States v. Arjona*, 120 U.S. 479, 483 (1887) ("The Government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries."); *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 555 (1870) (Bradley, J., concurring) (the national government "is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments").

[19] *Accord, e.g., Curtiss-Wright Export Co.*, 299 U.S. at 318 ("[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."); *Burnet v. Brooks*, 288 U.S. 378, 396 (1933) ("As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations.").

states' sovereign immunity "neither derives from nor is limited by the terms of the Eleventh Amendment" (*Alden v. Maine*, 119 S Ct. 2240, 2246-47 (1999)) because that amendment merely "confirms" the "presupposition" that immunity is an aspect of state sovereignty retained after the ratification of the Constitution. *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996). So too the Constitution's specific foreign-affairs provisions "confirm" the "presupposition" that, as a sovereign and independent nation, the United States commands the entire foreign-relations power.

This Court's foreign-relations decisions culminated in *Zschernig v. Miller*, 389 U.S. 429 (1968), which relied upon *Hines* and other authorities to conclude that "foreign affairs and international relations" are "matters which the Constitution entrusts *solely* to the Federal Government." *Id.* at 436 (emphasis added). *Zschernig* involved a facially neutral Oregon probate law that conditioned the inheritance rights of a nonresident alien upon the alien's ability to demonstrate that his country of origin would grant reciprocal rights to a U.S. citizen, and would not confiscate any of the inherited property. *Id.* at 430-31. However, under the Oregon law, judges searched "for the 'democracy quotient' of a foreign regime." This use of the law had "great potential for disruption or embarrassment" (*id.* at 435), "affect[ed] international relations in a persistent and subtle way," and "impair[ed] the effective exercise of the Nation's foreign policy." *Id.* at 440. The law thus intruded impermissibly into "matters which the Constitution entrusts solely to the Federal Government." *Id.* at 435-36. The Court concluded that the exclusive federal authority to regulate foreign relations is violated by state or local laws that have more than an "incidental or indirect effect in foreign countries," or that have "great potential for disruption or embarrassment" of United States foreign policy (*id.* at 434-35), "even in the absence of" federal action. *Id.* at

441. This Court reached this conclusion even though the United States as *amicus curiae* urged that Oregon's application of the statute did not unduly interfere with the Nation's conduct of foreign relations. *Id.* at 434; *see also id.* at 443 (Stewart, J., concurring). And, since *Zschernig*, the Court has continuously reaffirmed that the federal foreign-affairs power is not merely supreme to, but completely "exclusive" of, the states.[20]

Massachusetts urges (Pet. Br. 38) that *Zschernig* may simply be ignored as "unique." As shown above, constitutional history, structure, and case law before and since *Zschernig* refute this assertion and demonstrate that the federal power in this area is indeed an "exclusive" one. In fact, long before *Zschernig*, both this Court and numerous commentators viewed the existence of an exclusive federal foreign-affairs power as an uncontroversial and well-settled proposition.[21]

Massachusetts also urges (Pet. Br. 46) that—despite this longstanding approach—this Court should "reject"

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[20] *See Perpich v. Department of Defense*, 496 U.S. 334, 353 (1990); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 n.7 (1984).

[21] *See, e.g.*, S. Weaver, *Constitutional Law and Its Administration* § 77, at 103 (1946) ("In speaking of foreign affairs, our government is strictly national."); H. Rottschaefer, *Handbook of American Constitutional Law* 382 (1939) ("The conduct of the foreign relations . . . lies within the exclusive competence of the national government."); I W. Willoughby, *The Constitutional Law of the United States* § 189, at 450-51 (1910) ("The exclusiveness of the federal jurisdiction in all that concerns foreign affairs is deducible . . . from the national character of the General Government, . . . from the express provisions of the Constitution, . . . [and] the intention of the framers of the Constitution to invest the Federal Government with the exclusive control of foreign affairs."); H. Black, *Handbook of American Constitutional Law* 21 (1895) ("[A]ll authority over foreign relations and affairs is confided to the national government [and] all such authority is denied to the separate states."); T. Cooley, *Constitutional Limitations* 128 (1868) ("[A]ll international questions belong to the national government.").

any judicial role in protecting the exclusive federal foreign-affairs power, and instead leave resolution of any such conflicts to the "powers of Congress." This argument attempts to revive the "congressional negative" as the sole method of protecting the federal government from state usurpations of its powers, an approach the Framers found to be decidedly unsatisfactory, even when coupled with judicial review. The history of the Constitution demonstrates that "encroachments by the states on the federal authority [are] numerous and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation."[22] The Framers "t[ook] for granted" that judicial review would serve to prevent this encroachment.[23]

While the delegates to the Constitutional Convention debated granting Congress a power to negative state laws (and in fact adopted the Supremacy Clause making federal law the supreme law of the land), even the proponents of a congressional negative did not suggest that it could possibly operate as a substitute for judicial review, but only as a complementary adjunct.[24] They viewed the political branches as too beholden to state interests—and thus "likely to beget a disposition too obsequious" toward them—to serve as an effective check on state encroachments. *The Federalist No. 45* at 291 (J. Madison). Indeed, the national judiciary, although "established under the general Government," would "impartially" police the "boundary between the two jurisdictions . . . according to the rules of the Constitution; and all the usual and most effectual precautions [would be] taken to secure this im-

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[22] Madison, *Vices of the Political System of the United States*, in *The Mind of the Founder: Sources of the Political Thought of James Madison* 83 (M. Myers ed. 1973).

[23] R. Fallon *et al.*, *Hart and Wechsler's The Federal Courts and the Federal System* 11-12 (4th ed. 1996).

[24] *Id.*; *see also* C. Warren, *The Making of the Constitution* 316-24 (1928); J. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 171-77 (1996).

partiality." *The Federalist No. 39* at 245-46 (J. Madison). Massachusetts' suggestion that enforcement of the exclusive federal foreign-affairs power be placed solely in the hands of Congress would constitute nothing less than a wholesale rejection of the Framers' plan, which has been recognized by this Court since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Zschernig correctly accords with the Framers' plan by holding that the judiciary is fully capable of determining whether a state or local action is an exercise in foreign affairs, and thus an unconstitutional state encroachment on federal powers. *See* 389 U.S. at 440-41; *see also De-Canas v. Bica*, 424 US. 351, 355-56 (1976). And that judicial role is critical: The political branches of the national government, which are charged with making foreign policy, simply do not have the time and resources to monitor and police myriad state and local foreign-policy initiatives. J.A. 116.[25]

As the Court recognized in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), Congress cannot be expected to "anticipate and legislate with regard to every possible [foreign-relations] action the President may find it necessary to take or every possible situation in which he might act." *Id.* at 678. If Congress cannot be expected to "anticipate and legislate" with respect to the actions of a single Executive, it cannot possibly be expected to respond to foreign-affairs legislation and ordinances passed by 50 states and 39,000 local governments. Even if the political branches were to attempt such monitoring and enforcement, their reaction might well come far too late to avoid international repercussions. *See* Moore. *Federalism and Foreign Relations*, 1965 Duke L.J. 248, 253.

Most significantly, as the experience under the Articles of Confederation demonstrated, Congress would often be

[25] *See also* Br. *Amici Curiae* of Members of Congress Supporting Respondent at 27.

institutionally incapable of acting because of conflicting state interests. The present record serves as a vivid reminder of the virtual certainty of such conflict. A number of Senators and Representatives, including the entire Massachusetts delegation, have supported Massachusetts in this Court. Other Senators and Representatives have supported the position of the NFTC.[26] The concerns that the Framers had 200 years ago—about the ability of the national government to exercise effective control over state encroachments into the federal domain—are just as valid today as they were then.

D. The Burma Law Is A Foreign-Policy Measure That Intrudes Into The Exclusive Federal Sphere

As its primary line of defense, Massachusetts urges that the Burma Law is not a foreign-policy measure at all, but simply a law addressing a matter of "local" concern—that Massachusetts' spending might be viewed as supporting Myanmar. In Massachusetts' view, the statute is simply an effort to "disassociate" Massachusetts from Myanmar and has only an indirect effect on foreign affairs. Pet. Br. 32, 45.

In making this argument, Massachusetts ignores the history and objectives of its Law, its concessions below, and the demonstrated effect of the Law on numerous companies and U.S. foreign relations. There is nothing local about either the objectives of the Burma Law or its effects. The Burma Law was designed to, and does, conduct Massachusetts' "own little version of foreign policy" (J.A. 35), with the "identifiable goal [of] free democratic elections in Burma" (J.A. 39-40); indeed, Massachusetts concedes that its goal is "to promote human rights in Burma." Pet. Br. 21. It directly affects companies doing business in Myanmar and has evoked pro-

[26] *See* Br. *Amici Curiae* of Members of Congress Supporting Respondent; Br. *Amici Curiae* of Members of Congress Supporting Petitioner.

tests by foreign nations. This Court has itself recognized that secondary boycotts are not mere "disassociative" actions, but are heavily coercive. In *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.*, 456 U.S. 212 (1982), the Court held unlawful, under the NLRA, a union's refusal to handle cargo arriving from or destined for the Soviet Union to protest the invasion of Afghanistan. *See id.* at 214-15. The Court rejected the union's argument that the secondary boycott "simply . . . free[d] . . . members from the morally repugnant duty of handling Russian goods." *Id.* at 224. Rather, it held that such secondary boycotts "threaten neutral parties" (*id.* at 224 (internal quotation marks omitted)) on whom they impose a "heavy burden." *Id.* at 223.

Thus, the Burma Law, in both design and effect, sanctions private companies that do business with Myanmar. This is a typical foreign-policy measure. As discussed above (*see supra* pp. 12-13), such governmental boycotts have been used to conduct foreign policy at least since the time of the Articles of Confederation. And even today, the federal government frequently sanctions private companies doing business with foreign regimes to express the United States' displeasure and to attempt to change those regimes.[27] Despite Massachusetts' efforts to dress its actions in proprietary garb, it is perfectly clear that Massachusetts is doing exactly the same thing with the Burma Law, and the Law thus intrudes into the exclusively federal sphere.

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[27] *See, e.g.*, Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (prohibiting transactions with Cuba); Iran-Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (Iran, Libya); Exec. Ord. No. 13 067, 62 Fed. Reg. 59,989 (1997) (Sudan); Exec. Ord. No. 13,059, 62 Fed. Reg. 44,531 (1997) (Iran); Exec. Ord. No. 12,810, 57 Fed. Reg. 24,347 (1992) (Yugoslavia); Exec. Ord. No. 12,722, 55 Fed. Reg. 31,803 (1990) (Iraq); Exec. Ord. No. 12,543, 51 Fed. Reg. 875 (1986) (Libya).

Even if the Burma Law were not utilizing such a traditional foreign-relations tool, it nonetheless would be unconstitutional under *Zschernig*. *Zschernig* holds that state statutes, even if nominally local in character, can intrude "into the field of foreign affairs which the Constitution entrusts to the President and the Congress." 389 U.S. at 432. Both *Zschernig* and its predecessor, *Clark v. Allen*, 331 U.S. 503 (1947), involved state probate statutes with reciprocity requirements. In *Clark*, this Court did not discern an attempt by California to make foreign policy by criticizing foreign regimes; accordingly, the statute's effect was necessarily indirect and thus permissible. *Id.* at 517. *Zschernig* was quite different. There it was clear that the Oregon courts were using their probate statute to launch inquiries into the "types of governments that obtain in particular foreign nations" (389 U.S. at 434) and to criticize specific "nations established on a more authoritarian basis than our own." *Id.* at 440. This had "great potential for disruption or embarrassment" in U.S. diplomatic matters (*id.* at 435), rendering the probate law unconstitutional. *Id.* at 441. The Court specifically noted that "[h]ad [*Clark*] appeared in the posture of the present [case], a different result would have obtained." *Id.* at 433 & n.5. The Burma Law is indistinguishable from the law invalidated in *Zschernig*. "[T]he purpose of the statute"—to criticize and affect the government of Myanmar—is obvious from its face as well as from its history and operation. That alone is sufficient to invalidate it. Even Massachusetts appears to recognize that it can win this case only if *Zschernig* is "cabined to its facts." Pet. Br. 41.

Significantly, the Burma Law raises all of the concerns—reflected in the Court's decision in *Zschernig* and other cases—that led the Framers to make foreign affairs an exclusively federal domain.

First, individual states lack the expertise to create or enforce their own foreign policy.[28] Indeed, the Constitution stripped the states of the administrative mechanisms necessary to conduct an effective foreign policy: States were denied the authority to appoint or receive ambassadors (*see, e.g., Holmes*, 39 U.S. at 577 (Taney, C.J.)), and denied the power to make war or to maintain an army or navy in time of peace. U.S. Const. art. I, § 10. Likewise, states have no access to the federal intelligence apparatus, which is "essential to a successful foreign policy process." [29] Lacking access to these "vital" and "essential" tools, Massachusetts and other jurisdictions instead have turned to self-interested and unaccountable private sources—like the Investor Responsibility Research Center—to develop and administer the Burma Law and similar statutes. *See* MBL § 22J; Schmahmann & Finch, 30 Vand. J. Transnat'l L. at 199-200. The dangers of allowing such private parties to formulate foreign policy are obvious.

Second, state foreign policy may conflict with that of the federal government, making the national foreign policy less clear, effective, and credible.[30] Questions of foreign policy "uniquely demand single-voiced statement of the Government's views." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Conflict between the national government and the states would likewise impair "the flexibility . . . to respond to changing world conditions" (*Mathews v. Diaz*, 426 U.S. 67, 81 (1976)) that is so critical to today's "changeable and explosive" international relations. *Zemel*

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[28] *See* Br. *Amici Curiae* of Former U.S. Gov't Officials at 14-15.

[29] *The Role of Intelligence in the Foreign Policy Process: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. at vii (1980). *See also Snepp v. United States*, 444 U.S. 507, 512 n.7 (1980) (per curiam) ("It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence.").

[30] *See* Br. *Amici Curiae* of Former U.S. Gov't Officials at 11-13.

v. Rusk, 381 U.S. 1, 17 (1965). Moreover, as the EU points out, destruction of the one-voice principle would force foreign nations to deal with individual states on foreign-policy matters, something those nations "simply cannot [do]." [31]

The conflicts between the Burma Law and the federal approach are evident. *See infra* pp. 44-46. Even if these conflicts were not sufficient to preempt the statute, which they surely are, the divergence of the Burma Law from the federal sanctions creates a serious risk of "adversely affect[ing] the power of the central government to deal with those problems." *Zschernig*, 389 U.S. at 441. Ranking officials of the State Department have recognized that such state and local sanctions potentially "impede the President's and Secretary of State's conduct of foreign policy." J.A. 164; *see* Larson, *State and Local Sanctions: Remarks to the Council of State Governments* (Dec. 8, 1998) at 4.

State foreign-policy laws are particularly problematic when the national government views official silence as an appropriate means of conducting diplomacy,[32] or believes that economic engagement with a foreign nation is the preferred means of fomenting change. J.A. 109.[33] State and local sanctions would force the national government to speak out to invalidate state law, even if the national government were to view silence as a superior diplomatic strategy, and they blunt the national government's ability

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[31] Br. *Amici Curiae* of the European Communities and Their Member States at 5.

[32] *See* Maier, *The Bases and Range of Federal Common Law In Private International Matters*, 5 Vand. J. Transnat'l L. 133, 169 (1971) (official silence may "serve international commercial or political interests related to the desirability of continuing communication between the two countries").

[33] *See* Br. *Amici Curiae* of Members of Congress Supporting Respondent at 20-21.

to create economic incentives that reward favorable changes in a foreign nation's human-rights record. J.A. 120, 133. Even where the national government has not stood silent, state and local sanctions like the Burma Law often linger well past the national government's decision to cease sanctions against a foreign nation.[34]

Third, one state's action may carry severe consequences for the nation as a whole—objections by foreign governments, refusal of foreign concerns to do business with U.S. entities because U.S. foreign policy is viewed as unreliable, or, in an extreme case, even war. These dangers were vividly demonstrated by the incidents that occurred under the Articles of Confederation. *See supra* pp. 11-14. The Federalist urged that because "[t]he union will undoubtedly be answerable to foreign powers for the conduct of its members . . . [t]he responsibility for an injury ought ever to be accompanied with the faculty of preventing it." *The Federalist No. 80* at 476 (A. Hamilton). Another pertinent passage cautioned that if each state could go its own way, foreign states would refuse to conclude trade treaties with the Nation.

> No nation acquainted with the nature of our political association would be unwise enough to enter stipulations with the United States, conceding on their part privileges of importance to them, while they were apprised that the engagements on the part of the Union might at any moment be violated by its members, and while they found from experience that they might enjoy every advantage they desired in our markets without granting us any return but such as their momentary convenience might suggest.

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[34] *See* Fenton, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 Nw. J. Int'l L. & Bus. 563, 565 (1993) (over 100 state and local laws sanctioning South Africa remained in force after the United States dismantled its sanctions in response to the abolition of apartheid).

The Federalist No. 22 at 143-44 (A. Hamilton). So too this Court has recognized that "[t]he national government is . . . responsible to foreign nations for all violations by the United States of their international obligations." *Arjona*, 120 U.S. at 483; *accord* Restatement (Third) of the Foreign Relations Law of the United States § 207 (1987).

The Burma Law is threatening similar consequences to the Nation.[35] Japan, the EU, and ASEAN have complained that the Law violates the United States' international obligations, including its obligations under the WTO's "Government Procurement Agreement." J.A. 88-92. While the Burma Law has not yet led to retaliation by other countries, that possibility remains a real one. If adverse consequences result, it will be the duty of the federal government to deal with them. And while the Burma Law will not lead to war with Myanmar, trade sanctions can have that effect: The United States' escalating embargo against Japan in the late 1930s and early 1940s ultimately culminated in the bombing of Pearl underHarbor. R. Ellings, *Embargoes and World Power: Lessons From American Foreign Policy* 121-22 (1985).

Finally, all of these concerns about conflict, interference, and multiple voices are magnified where multiple jurisdictions are involved with the potential for serious conflict among them. In *Zschernig*, the Court noted that the foreign-relations impact of the Oregon law was even greater given that similar laws were in force in other states. 389 U.S. at 433-34, 437 n.8. *See also Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). Likewise, the foreign-relations implications of the Burma Law are "magnified when Massachusetts is viewed as part of a broader pattern of state and local intrusion." Pet. App. 23a. Indeed, Massachusetts "hope[s]" that "when combined with similar efforts worldwide" the Law will "prompt a foreign government to respect human rights."

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[35] *See* Br. *Amici Curiae* of Former U.S. Gov't Officials at 7-8.

Pet. Br. 43. States and municipalities increasingly are adopting "laws, ordinances, and resolutions that target multinational corporations 'doing business' in countries of concern."[36] Were this Court to reverse the Court of Appeals, it is virtually certain that the amount of similar state and local legislation would increase exponentially: 21 states and 16 municipalities have come to this Court as *amici* seeking the power to enact selective purchasing laws, and the public and certain nature of this Court's decisions would surely encourage many more to follow suit if state power in this area were sustained, further straining U.S. foreign relations.[37] Conflict among such enactment would be inevitable in many contexts.

What has already been said should dispel Massachusetts' unprecedented suggestion (Pet. Br. 25) that the Burma Law is insulated from constitutional scrutiny by a "market-participant exception" to the exclusive federal foreign-relations power. Even putting aside the fact that Massachusetts is acting as a market regulator and not a mere "participant" (*see infra* pp. 36-42), there would be no basis whatsoever for extending this "narrow exception" (*Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 588 (1997)) beyond its role under the Interstate Commerce Clause. Indeed, in *United Building & Construction Trades Council v. Mayor & Council of Camden*, the Court "decline[d] to transfer mechanically" the market-participant exception—"an analysis fashioned to fit the Commerce Clause"—onto the Privileges and Immunities Clause of Article IV. 465 U.S. 208, 219 (1984). The reason was that "[t]he two Clauses have different aims and set different standards

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36 Investor Responsibility Research Center, *State and Local Selective Purchasing Laws As of September 1997*, at 1 (copy lodged with the Court on December 31, 1999).

37 *See* Br. *Amici Curiae* of the European Communities and Their Member States at 4.

for state conduct." *Id.* at 220. So too with the exclusive foreign-relations power: Concerns that the Nation be able to conduct its foreign affairs effectively and in accord with principles of international law "cu[t] across the market regulator-market participant distinction that is crucial under the [Interstate] Commerce Clause." *Id.* As the Burma Law itself demonstrates, and as Massachusetts concedes, even a law characterized as mere participation in a marketplace can make foreign policy because "spending decisions will inevitably rile foreign countries and . . . risk embarrassment to the United States." Pet. Br. 11.

In sum, the Burma Law is an unconstitutional exercise of foreign-affairs power by the Commonwealth. It suffers from all of the inherent defects of state foreign-affairs efforts that led the Framers to exclude the states from conducting foreign policy. This Court should affirm.

II. THE BURMA LAW VIOLATES THE FOREIGN COMMERCE CLAUSE

The Court of Appeals also correctly held that the Burma Law violates the Foreign Commerce Clause.

A. The Burma Law Discriminates Against Foreign Commerce, Seeks To Regulate Extraterritorial Conduct, And Interferes With The National Government's One Voice On Foreign Commercial Relations

1. *The Burma Law Is Discriminatory.* Discriminatory restrictions on interstate commerce are "virtually *per se* invalid";[38] the same goes for laws that discriminate against foreign commerce.[39] Over a century ago, the Court explained that "one main object of the Constitution" was preventing "discriminations favorable or adverse

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38 *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93, 99 (1994).

39 *See, e.g., Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 313-14 (1994); *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Finance*, 505 U.S. 71, 75-77 (1992).

to commerce with particular foreign nations [that] might be created by State laws." *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 317 (1851). The Burma Law plainly fails this constitutional test—it singles out commerce with and in Myanmar and treats that commerce less favorably than it does domestic and other international commerce. Pet. App. 51a.

This Court has repeatedly invalidated state laws that discriminate against a particular foreign jurisdiction,[40] and even Massachusetts' *amici* admit that the Burma Law "facially discriminates against foreign commerce." Br. *Amici Curiae* of Council of State Governments *et al.* at 20. Massachusetts' own cursory defense of the discrimination seems to be an afterthought. Massachusetts contends (Pet. Br. 47) that the Burma Law is "distinguishable" from other laws that violate the Foreign Commerce Clause because it "applies equally" to firms within and without Massachusetts, and does not favor in-state interests. As the Court of Appeals recognized (Pet. App. 52a), this Court explicitly rejected this argument in 1992 in *Kraft*: "As the absence of local benefit does not eliminate the international implications of the discrimination, it cannot exempt such discrimination from Commerce Clause prohibitions." 505 U.S. at 79.

2. *The Burma Law Regulates Extraterritorially.* As the Court of Appeals held (Pet. App. 55a-57a), the Burma Law is impermissible under the Commerce Clause for yet another reason: It seeks to regulate commerce far beyond the borders of Massachusetts. For more than a century, this Court has recognized that "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). That is so because no single state can "impose its own

[40] *See, e.g., New Energy Co. v. Limbach*, 486 U.S. 269, 276 (1988); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977).

policy choice[s] on neighboring States." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 (1996). In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Court struck down a New York liquor-pricing statute because it "regulate[d] out-of-state transactions in violation of the Commerce Clause." *Id.* at 582. Just as state laws directly regulating commerce in other states violate the Interstate Commerce Clause, so too laws directly regulating commerce in foreign countries violate the Foreign Commerce Clause.

Massachusetts concedes that the Burma Law is intended to "promote human rights" (Pet. Br. 21) and "encourage change" in Myanmar (Pet.. Br. 31); the Law also directly regulates the activities of hundreds of foreign companies. J.A. 219. The Law is plainly an attempt to legislate extraterritorially, as the Court of Appeals properly concluded. Pet. App. 56a. Indeed, were the Law upheld, one can imagine a panoply of similar laws that would follow, with an adverse effect on *interstate* commerce: A municipality could insist that government contractors require their employee-benefit plans to cover same-sex workers wherever located (*see Air Transport Ass'n v. City and County of San Francisco*, 992 F. Supp. 1149, 1155 (N.D. Cal. 1998) (striking down similar laws on Commerce-Clause extraterritoriality grounds)); likewise, an anti-death penalty state (*e.g.*, Massachusetts) could insist on trading only with companies that refuse to do business in or with states where the death penalty is imposed (*e.g.*, Texas).

3. *The Burma Law Impairs the Federal Government's "One Voice" on Foreign Commerce Matters.* Finally, the Law significantly impairs the ability of the federal government to "speak with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (quotation omitted). The requirement derives from the

long-recognized fact that "[f]oreign commerce is preeminently a matter of national concern." *Id.* at 448. Thus, although a law may not run afoul of the Foreign Commerce Clause if it "merely has foreign resonances, but does not implicate foreign affairs," a law that "implicates foreign policy issues . . . must be left to the Federal Government." *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

Part I of this brief describes at length why the Burma Law interferes with the federal power over foreign affairs; that showing also demonstrates that the Law violates the "speak-with-one-voice" principle. But the Foreign Commerce Clause goes further than the foreign-affairs analysis in one important respect—it applies even if a state law is not designed or used to make foreign policy, so long as the law has a substantial effect on international relations. In *Container Corporation*, the Court emphasized that "the threat [a law] might pose of offending our foreign trading partners" is an important aspect of Foreign-Commerce-Clause analysis. 463 U.S. at 194. As discussed above, that effect is clearly present here. The Burma Law has already caused considerable international tensions involving Japan, the ASEAN, and the EU. *See supra* p. 6. Furthermore, as discussed in Part IV below, no congressional "approval" saves the Law from challenge under the "one-voice" principle.

B. The Market-Participant Exception Does Not Save The Burma Law Because The Law Is Regulatory, Not Proprietary

Petitioners expend their maximum effort (Pet. Br. 25-36) to urge that a "market-participant exception" should insulate the Burma Law from Commerce-Clause scrutiny. The Court of Appeals rejected this argument (Pet. App. 42a-50a), as should this Court.

The "market-participant exception" is based on the notion that states, when they are participating in a market

in a proprietary fashion, are not bound by the Interstate Commerce Clause. *See Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Notably, the Court has twice reserved the question of whether the "market-participant exception" applies to save otherwise unconstitutional discrimination against foreign commerce. *See Reeves*, 447 U.S. at 437 n.9; *South-Central Timber*, 467 U.S. at 92 n.7. But, like the Court of Appeals (Pet. App. 48a-50a), this Court need not reach the issue in this case, for the Burma Law is classic regulation, not market participation.

This Court's cases, both in Commerce-Clause and preemption contexts, seek to determine whether an exercise of a state's spending power is regulatory or proprietary. Under those cases, the Burma Law is manifestly regulatory, not proprietary.

In three Interstate-Commerce-Clause cases, this Court has found state action to be proprietary. In one, the state's action was limited to a single facility. In *Reeves, Inc. v. Stake*, the Court allowed a South Dakota-owned cement plant to prefer residential sales over out-of-state sales. 447 U.S. at 437, 446-47. In two other cases, somewhat broader programs were sustained. In *Hughes v. Alexandria Scrap Corp.*, the Court permitted Maryland to purchase scrap automobiles solely from in-state scrap processors to help rid the state of junk cars. 426 U.S. at 809-10. And in *White v. Massachusetts Council of Construction Employers, Inc.*, the Court upheld a mayoral order requiring all City of Boston-funded construction projects to be performed by a work force comprised of at least 50% bona fide Boston residents. 460 U.S. 204, 209-10, 214-15 (1983). Collectively, these cases establish that a state "acting in its proprietary capacity . . . may 'favor its own citizens over others.'" *Camps Newfound/Owatonna*, 520 U.S. at 592-93.

In *White*, the Court cautioned that the market-participant exception is not a vehicle by which states may engage in free-ranging regulatory efforts: "[T]here are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business." *Id.* at 211 n.7. As an illustration, the Court cited (*id.* at 210-11) *Hicklin v. Orbeck*, a case striking down a wide-ranging Alaska preferential-hiring statute that applied to every company with any remote connection to the sale of Alaskan oil and gas leases. *See* 437 U.S. 518, 531 (1978). Likewise, in *South-Central Timber*, the plurality held that an Alaska statute requiring all purchasers of state-owned timber to process that timber in-state was downstream regulation, not proprietary activity. *See* 467 U.S. at 99 (plurality op.).

A similar proprietary-regulatory distinction has proven crucial in preemption cases where a state attempts to justify its intrusion into a federal sphere as market participation. While those cases suggest that more stringent restrictions on market activity may exist in the preemption context, they provide valuable guidance as to whether a state action is proprietary or is in fact regulatory. In *Wisconsin Department of Industry, Labor and Human Relations v. Gould*, the Court held that a Wisconsin contract debarment statute designed to enforce the NLRA was "tantamount to regulation," and not a proprietary action. 475 U.S. 282, 289 (1986). In *Chamber of Commerce v. Reich*, the District of Columbia Circuit held that an Executive Order authorizing the Secretary of Labor to bar employers from federal contracts because they hired permanent replacement workers during a lawful strike was a regulatory action. 74 F.3d 1322, 1335-36 (D.C. Cir. 1996). This Court in *Building and Construction Trades Council v. Associated Builders and Contractors* held that a pre-hire labor agreement between a

Massachusetts agency and a union was proprietary because it was tailored to a specific job by a state agency acting "just like a private contractor." 507 U.S. 218, 221-23, 227-30 (1993).

By any measure, the Burma Law is not a proprietary state action. *First*, unlike the scrap-car purchasing program in *Alexandria Scrap*, the cement-sales program in *Reeves*, and the hiring preference in *White*, the Burma Law does not favor the commercial interests of Massachusetts or its residents. Even Massachusetts' *amici* recognize that the "[L]aw imparts no economic benefit to the Commonwealth or its taxpayers." *See* Br. *Amici Curiae* of the Council of State Governments *et al.* at 20. The Law's stated purpose is to benefit citizens of distant Myanmar by fomenting "free democratic elections in Burma." J.A. 40. This purpose is not economic; it is not even local. Thus, contrary to Massachusetts' suggestion (Pet. Br. 33), the Law bears no resemblance to the scrap-car purchasing program in *Alexandria Scrap*, which, as a result of conferring a local economic benefit to scrap processors, also conferred a local aesthetic benefit—removal of hulks from Maryland roadways—to the "public." *See* 426 U.S. at 796-97, 809-10.

Second, unlike the state programs upheld in *Alexandria Scrap*, *Reeves*, and *White*, the Burma Law does not operate in the "market" in which Massachusetts is "participating." As the plurality concluded in *South-Central Timber*, the market-participant doctrine "is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." 467 U.S. at 97 (plurality op.). Even if a state spending program were designed to create a local economic benefit, the state cannot use that program to affect a trading partner's separate lines of business. But that is precisely

what the Burma Law does. For instance, under the Law, Massachusetts would refuse to acquire office supplies from a large corporation with a foreign subsidiary that imports raw timber from Myanmar, even if Massachusetts were not in the market to purchase raw timber. This type of secondary boycott takes the Law far outside of the proprietary arena. *See White*, 460 U.S. at 210-11; *Building & Construction Trades Council*, 507 U.S. at 227, 230.

The Burma Law is much like the laws that were not insulated by a market-participant exception in *Hicklin v. Orbeck* and *South-Central Timber*. Similar to Massachusetts in the present case, Alaska in *Hicklin* was attempting to use sales of its oil and gas resources to affect unrelated lines of business. The state's "Alaska Hire" statute mandated an Alaska-resident hiring preference for "all employment which is a result of" the sale of oil and gas resources. 437 U.S. at 529. This Court noted that the statute's effects "extend[ed] to employers who have no connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State." *Id.* at 530. This "attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources" violated the Privileges and Immunities Clause (*id.* at 531), and, as the Court later held, also constituted market regulation that would fall outside of the market-participant exception. *White*, 460 U.S. at 210-11. Similarly, in *South-Central Timber*, the Court struck down an Alaska requirement that timber taken from state lands be processed within the state. Alaska was not selling timber-processing services, and the plurality made clear that a state "may not impose conditions, whether by statute, regulation, *or contract*, that have a substantial regulatory effect outside of" the market in which a state is a participant. 467 U.S. at 97 (plurality op.) (emphasis added). Alaska was not "merely choosing its own trading partners," but was "attempting to govern the private, separate economic relationships of its trading partners." *Id.* at 99 (plurality op.). So too here.

Third, state action is proprietary only if it is "analog[ous] to the activity of a private purchaser." *New Energy Co.*, 486 U.S. at 278. It is regulatory if the state "is not functioning as a private purchaser of services." *Gould*, 475 U.S. at 289. The District of Columbia Circuit, in *Chamber of Commerce*, recently provided a detailed exposition of this rule: When a government actor makes an "economically rational" purchasing decision, it is acting as a "market participant," but when its actions are not those that a private purchaser of services would take, it is a "market regulator." In the latter circumstance, the government's "role as buyer is . . . a sham designed to conceal an effort to regulate."[41] The Commonwealth's *amici* themselves concede that the courts have inquired "whether the State is acting in the same way that a private party would act in contracting."[42]

While private contractors may sometimes decline to purchase goods and services produced in a particular country or under particular conditions because of human rights concerns (C.A. App. 413-14), it is undisputed in the record that the Massachusetts Burma Law's approach —declining to do business with companies that do business in a particular foreign country because of objections to that country's human rights record—is one that "would not be taken by *any* private contracting party." C.A. App. 32, ¶ 12 (emphasis added). Because no private party making economically rational purchasing decisions

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[41] 74 F.3d at 1336 (quoting *Associated Builders & Contractors v. Massachusetts Water Resources Auth.*, 935 F.2d 345, 366 (1st Cir. 1991) (*en banc*) (Breyer, C.J., dissenting), *rev'd*, 507 U.S. 218 (1993)).

[42] Br. *Amici Curiae* of Arkansas *et al.* at 14.

would adopt the Law's approach, it is a regulatory exercise undertaken in Massachusetts' "sovereign capacity," not its "proprietary capacity." *Camps Newfound/Owatonna*, 520 U.S. at 594.

Contrary to the contention of some of the Commonwealth's *amici*,[43] the market-participant exception does not apply just because regulatory activity of the same type might be lawful, or might be engaged in by private parties. This Court has observed that regulatory action "exists to a limited extent in the private sphere" and that "[p]rivate actors . . . may 'regulate' as they please, as long as their conduct does not violate the law" (*Building and Construction Trades Council*, 507 U.S. at 229), specifically singling out policy-driven boycotts as an example:

> A private actor . . . can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive. . . . The private actor under such circumstances would be attempting to "regulate" the suppliers and would not be acting as a typical proprietor.

Id. But a state can enjoy the market-participant exception only if it is acting as a "typical proprietor" and not as a regulator. The Burma Law is a quintessentially regulatory action that falls outside of any market-participant exception.

If applied at all, the market-participant exception should, at a minimum, be narrowly construed in the context of foreign commerce. While the market-participant exception is justified by "considerations of state sovereignty" (*Reeves*, 447 U.S. at 438), as the Court explained in *Japan Line*, "[i]t has never been suggested that Congress' power to regulate foreign commerce could be . . . limited" by "considerations of federalism or state sover-

[43] *See* Br. *Amici Curiae* of Arkansas *et al.* at 14; Br. *Amici Curiae* of Council of State Governments *et al.* at 13-14.

eignty." 441 U.S. at 449 n.13. Thus, the same foreign-relations concerns that drive the more "vigorous and searching scrutiny" of state action alleged to violate the Foreign Commerce Clause (*South-Central Timber*, 467 U.S. at 100) similarly counsel a more "vigorous and searching scrutiny" of any purported market-participant justification. The Burma Law cannot survive such scrutiny.

III. THE BURMA LAW IS PREEMPTED

As the Court of Appeals held, the Federal Burma Law and the Executive Order implementing it preempt the Massachusetts Burma Law. In fact, the Commonwealth does not seriously challenge the Court of Appeals' finding that the Law "veers from the carefully balanced path that Congress has constructed." Pet. App. 70a.

A. State Foreign-Affairs Laws Are Subject To Strict Scrutiny

Petitioners and some *amici* argue that the Court of Appeals erred by applying a presumption in favor of preemption of state laws, rather than a presumption against such preemption.[44] This argument is meritless. In *Hines v. Davidowitz*, this Court held that when concurrent federal and state legislation exists "in a field which affects international relations," any "concurrent state power that may exist is restricted to the narrowest of limits." 312 U.S. at 68. So too in *Boyle v. United Technologies Corp.*, this Court held that where a state law implicates a "uniquely federal interest," the "conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the States have traditionally occupied." 487 U.S. 500, 507 (1988) (quotation omitted). Thus, where federal legislation "touch[es] on a field" like foreign relations, "in which the federal interest is . . . dominant[,] . . . the

[44] Pet. Br. 15-16; Br. *Amici Curiae* of Members of Congress Supporting Petitioners at 5-6.

federal system will be assumed to preclude state laws on the same subject." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *accord, e.g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978).

Massachusetts admits, as it must (Pet. Br. 21), that its Law legislates "on the same subject" as the federal sanctions against Myanmar. Thus, the Federal Burma Law is "assumed to preclude" state laws such as the Massachusetts Law. Massachusetts cites *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), for the proposition that the Court "must look for special features warranting preemption." Pet. Br. 22. That proposition certainly is correct, and the very "special feature" that the *Hillborough County* Court gave as an example was "the dominance of the federal interest in foreign affairs." 471 U.S. at 719 (citing the "seminal case" of *Hines*). Where, as here, a state law impacts foreign affairs, the preemption inquiry is simply whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. The Massachusetts Law in fact has that effect.

B. The Massachusetts Law Disrupts The Carefully Crafted Federal Balance

The Massachusetts Law would be preempted under any preemption standard. Massachusetts itself concedes (Pet. Br. 30-31) that there are "important" and "obvious differences" between the state and federal laws. Indeed, the Massachusetts Law is flatly inconsistent with the Federal Burma Law in at least five significant respects, as the Court of Appeals held. Pet. App. 70a-71a.

First, the Massachusetts Law "applies to virtually all investment in Burma," while the Federal Law "limit[s] only new investment in the 'development of resources.'" Pet. App. 70a; *see* OCCA §§ 570(b), (f)(2). Then-Assistant Secretary Larson described the more limited

scope of the Federal Law as "a considered federal government decision not to impose much more rigorous economic sanctions and thereby to maintain some level of economic engagement with Burma in order to further our foreign policy objectives there." Larson, *supra*, at 3-4. Indeed, Congress specifically considered—but rejected—an amendment that would have prohibited all U.S. investment in Myanmar. S. 1092, 104th Cong., 1st Sess. (1995).

Second, the Massachusetts Law permits no trade with Burma, while "[t]he Federal Burma Law permits some trade with Burma." Pet. App. 70a-71a. The Federal Law does not prohibit companies that do business in Myanmar from contracting for goods, services, and technology. *See* OCCA § 570(f)(2). Congress viewed some continued economic ties to Myanmar as best facilitating democracy.[45]

Third, the Massachusetts Law "applies to parties, including foreign companies, not covered by the federal law." Pet. App. 71a; *compare* Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (1997) *with* MBL § 22G. Thus, the extraterritorial effects of the Massachusetts Law are far broader in scope than those of the Federal Law.

Fourth, the Massachusetts Law has no termination condition or provision, while "the federal law provides for sanctions to be terminated upon a finding by the President that human rights conditions in Burma have improved." Pet. App. 71a. The President—who has both expertise in and the responsibility of coordinating the Nation's foreign policy—"can weigh all the issues at stake at any given moment, take account of rapidly changing situations, and effectively tailor our response . . . in order best to advance our national interests." Larson, *supra*, at 2.

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[45] *See, e.g.*, 142 Cong. Rec. S8751 (daily ed. July 25, 1996) (Sen. Bond) ("U.S. firms are the ones on the ground who can help spread American values.").

The Massachusetts Law would remain in effect even if federal sanctions were eliminated.

Fifth, Massachusetts' "unilateral strategy toward Burma directly contradicts the Federal Law's encouragement of a multilateral strategy." Pet. App. 71a. Thus, under the Federal Law, the President must work with other countries to promote democracy in Myanmar. *Id.* The unilateral Massachusetts Law stands as an obstacle to the program carefully tailored by Congress.

Where Congress "in the exercise of its superior authority in th[e] field" of foreign relations has struck such a delicate balance, state legislation that "conflict[s] or interfere[s] with, curtail[s] or complement[s], the federal law" is preempted. *Hines*, 312 U.S. at 66; *accord Pink*, 315 U.S. at 233. This basic principle extends far beyond the foreign-affairs context. For example, in *Gade v. National Solid Wastes Management Ass'n*, state licensing acts designed to supplement federal OSHA standards were preempted. The Court held that states may not "selectively . . . 'supplement' certain federal regulations with ostensibly nonconflicting standards." 505 U.S. 88, 103 (1992).

Massachusetts' claim (Pet. Br. 21-22) that its Law and the Federal Law have a "shared goal" is simply irrelevant. "In determining whether state law 'stands as an obstacle' to the full implementation of a federal law, 'it is not enough to say that the ultimate goal of both federal and state law' is the same." *Gade*, 505 U.S. at 103 (citation omitted). Regardless of their "goals," where, as here, a state law "interferes with the methods by which the federal statute was designed to reach [its] goal," state law is preempted. *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987); *accord Gould*, 475 U.S. at 86.[46]

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[46] *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), cited by Massachusetts (Pet. Br. 22), is not to the contrary. In *CTS Corp*, the Court held that a state statute was not preempted not only because the state statute "further[ed] a basic purpose" of the federal statute, but also because the Court found "the alleged conflict illusory." *Id.* at 82, 84.

IV. CONGRESS HAS NOT APPROVED THE MASSACHUSETTS BURMA LAW

While Massachusetts' brief is less than clear on this point, it appears to suggest (Pet. Br. 17-21) that Congress somehow has "approved" the Burma Law and that the "approval" shields the Law, not only from preemption, but also from foreign-affairs and Foreign-Commerce-Clause scrutiny. There is a serious question whether federal approval could shield the law from a foreign-affairs challenge under any circumstances. In *DeCanas v. Bica*, the Court observed that if California's alien-employment statute had in fact been a "constitutionally proscribed regulation of immigration," Congress "would be powerless to authorize or approve [it]." 424 U.S. at 355-56. A leading commentator has likewise urged that "it seems clear . . . that Congress could not ratify a state's intrusion into foreign affairs." L. Tribe, *American Constitutional Law* § 6-35, at 1246 n.45 (3d ed. 2000) (citing *Zschernig*). But even assuming that Congress could approve the Law under both the foreign-affairs powers and its commerce powers, Congress has not in fact "approved" the Burma Law, implicitly or otherwise.

Massachusetts grasps at the Uruguay Round Agreements Act of 1994 ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809, as a purported source of explicit permission. But the URAA has no bearing whatsoever on the ability of a party to bring a constitutional challenge to a state law. By its terms, the URAA prohibits only private actions that claim a "State law . . . [is] invalid . . . [because it] is inconsistent with any of the Uruguay Round Agreements." 19 U.S.C. § 3512(b)(2)(A). As the Court of Appeals properly held (Pet. App. 25a-26a), the URAA

does not apply to this case: This suit does not allege that the Law violates the Uruguay Round Agreements.

Massachusetts, relying principally on *Barclays*, also argues that because Congress might have been aware of the Burma Law when it enacted federal sanctions against Myanmar, it has thereby conveyed "implicit . . . permission" for the Law. Pet. Br. 19-20. *Barclays* supports no such rule. In that case, the Court turned back a Foreign Commerce Clause "speak-with-one-voice" challenge to a nondiscriminatory California tax statute requiring worldwide combined reporting of income and expenses in part because Congress had thoroughly debated, but not enacted, numerous bills that would have eliminated the challenged state-taxation system. 512 U.S. at 325-26; *see also id.* at 326 nn.24-25. The Court concluded that "[g]iven these indicia of Congress' willingness to tolerate" the taxation scheme, there was no threat to Congress' ability to speak with "one voice." *Id.* at 37.

Importantly, *Barclays* reached the question of congressional permission only after it found the statute nondiscriminatory. *Id.* at 310-14. *Barclays* also confirmed that mere inferences from congressional inaction cannot save a state law, such as the Burma Law, that discriminates against foreign commerce. Rather, where a law is discriminatory, Congress must "convey its [permissive] intent with . . . *unmistakable clarity*." *Id.* at 323 (emphasis added).[47] Nor does *Barclays* hold that congressional silence can be read to permit actions, like the Burma Law, that regulate "out-of-state transactions in violation of the Commerce Clause." *Brown-Forman Distillers*, 476 U.S. at 582; *see supra* pp. 34-35. And nothing in *Barclays* remotely suggests that the states may intrude into

[47] *Accord New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982); *Maine v. Taylor*, 477 U.S. at 139.

the area of foreign affairs based on congressional silence —silence that may itself serve important foreign policy objectives.

Even if *Barclays*' holding were applicable in this case, no congressional approval of "unmistakable clarity" exists here, or is even suggested by Massachusetts. Even Massachusetts concedes that, at best, Congress might have been aware of the Burma Law when it enacted the federal sanctions. Pet. Br. 17. This is a far cry from the congressional actions described in *Barclays*—repeated and thorough debate of numerous bills aimed squarely at eliminating California's tax system. At best, there is parallel federal action here; but parallel federal action cannot save unconstitutional state statutes. In *South-Central Timber*, the Court held "the fact that . . . state policy . . . appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent . . . to authorize a similar state policy." 467 U.S. at 92. And, as shown in Part III above, the Massachusetts Law is not parallel, but, in fact, directly inconsistent with the federal act.

Massachusetts attempts to bolster its "implicit permission" theory by claiming (Pet. Br. 17-18) that Congress "consistently" fails to preempt state and local sanctions. This argument asks the Court to assume that 1980s-era state and local sanctions against South Africa were constitutional, and to reason from that premise that implied congressional approval is sufficient to sustain such laws. The premise is faulty because this Court never passed on whether these state and local sanctions were themselves constitutional. Even so, the congressional record on South Africa is quite different, involving two House resolutions (*see* H.R. Res. 548, 549, 99th Cong., 2d Sess. (1986)) and two congressional enactments supporting

state sanctions.[48] Of course, no similar action is present here.

Nor does the Export Administration Act's express preemption of all state "anti-Arab-boycott" laws aid Massachusetts. *See* 50 U.S.C. App. § 2407(c). The fact that Congress expressly preempted those state laws does not indicate that Congress believed that they were constitutional absent express preemption.

In sum, there is no basis whatsoever to assume that Congress somehow silently ratified a law that invades an exclusively federal realm, with discriminatory, burdensome, and extraterritorial effect, and that conflicts with the goals and means chosen by Congress to deal with the same problem.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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[48] *See* Br. *Amici Curiae* of Members of Congress Supporting Petitioners at 8.